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NO. 931342

IN THE
SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1994

WILLIAM B. TANNER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Is an "intangible rights" mail fraud conviction (18 U.S.C. 1341) which is facially invalid pursuant to McNally v. United States, 483 U.S. 350 (1987) a fundamental error entitling Petitioner to expungement through a writ of error coram nobis or must Petitioner make some additional showing to be entitled to issuance of the writ?

II. Does the pre-McNally v. United States, 483 U.S. 350 (1987) decision of Flippins v. United States, 747 F.2d 1089 (6th Cir. 1984) govern issuance of a writ of error coram nobis in the case of a facially invalid "intangible rights" mail fraud conviction?

III. If Flippins v. United States, 747 F.2d 1089 (6th Cir. 1984) governs issuance of a writ of error coram nobis is the outcome of the challenged proceeding as addressed in Flippins, supra, the fact of the challenged conviction itself or as the lower courts held the amount of incarceration a defendant may have received irrespective of whether the challenged conviction is valid?

LIST OF INTERESTED PARTIES PURSUANT TO RULE 29.1

1. WILLIAM B. TANNER

2. UNITED STATES OF AMERICA

3. GLANKLER BROWN
(Counsel for Petitioner, William B. Tanner)

4. Steve Parker, Assistant United States Attorney
(Counsel for United States of America)

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ii. Assuming, as the lower courts did that the requirements of Flippins are applicable, the lower courts nevertheless improperly interpreted same.

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DECISIONS BELOW

On January 30, 1985, William B. Tanner, hereinafter "Petitioner," pled guilty to a four count criminal information. Count one charged a violation of the mail fraud statute, 18 U.S.C. §1341. The information is attached as Appendix D. Following Petitioner's guilty plea this Court retroactively invalidated mail fraud convictions based on what has commonly been referred to as "intangible rights" mail fraud theory in the 1987 opinion of McNally v. United States, 483 U.S. 350 (1987).

On May 30, 1989, Petitioner filed a Petition for Writ of Error Coram Nobis in the United States District Court for the Western District of Tennessee. The Petition for Writ of Error Coram Nobis and the affidavit of Petitioner in support are attached as Appendices E and E-1 respectively. The petition sought expungement of the one count conviction pursuant to 18 U.S.C. §1341 and return of the $1,000 fine imposed as a result

of the conviction. Some three years following the filing of the petition, the district court rendered a memorandum opinion dated November 17, 1992 denying the Petition for Writ of Error Coram Nobis. The district court's opinion is attached as Appendix A. Petitioner then sought a timely appeal to the United States Court of Appeals for the Sixth Circuit. By order filed October 21, 1993, the appellate court found no prejudicial error intervened in the judgment and proceedings in the district court although the appellate court declined to author any opinion. The one page order of the appellate court is attached hereto as Appendix B. Petitioner filed on November 4, 1993, a timely Petition for Rehearing in the United States Court of Appeals for the Sixth Circuit although said petition was likewise denied without opinion. The order denying the Petition for Rehearing dated November 23, 1993 is attached hereto as Appendix C.

JURISDICTIONAL STATEMENT

The subject matter of this Petition for Writ of Certiorari was initiated on May 5, 1989 when Petitioner filed in the United States District Court for the Western District of Tennessee a Petition for Writ of Error Coram Nobis pursuant to the All Writs Statute, Title 28 U.S.C. §1651. The Petition for Writ of Error Coram Nobis was filed as a result of this Court's decision in McNally v. United States, 483 U.S. 350 (6th Cir. 1987) invalidating convictions pursuant to 18 U.S.C. §1341 based on what has commonly been referred to as the intangible rights mail fraud theory.

Petitioner invokes the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. §1254(1) and requests certiorari to review a judgment and opinion of the United States Court of Appeals for the Sixth Circuit rendered on October 21, 1993 which is directly contrary to McNally. Following the October 21, 1993 ruling of the United States Court of

Appeals for the Sixth Circuit, Petitioner timely filed a Petition for Rehearing in the United States Court of Appeals for the Sixth Circuit pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Petitioner's Petition for Rehearing was denied on November 23, 1993. This Petition is timely filed in accordance with 28 U.S.C §1254 and Rule 13.4 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES PRESENTED FOR REVIEW

This Petition concerns the constitutionality of Petitioner's May 3, 1985 conviction pursuant to 18 U.S.C. §1341 since the conviction was based totally upon an "intangible rights" theory as invalidated by McNally, supra. The subject mail fraud statute provides:

> **18 U.S.C §1341 Frauds and swindles**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or

> fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner was charged on January 29, 1985 in a four count criminal information in the United States District Court for the Western District of Tennessee, Cr. No. 85-20030-M which is attached as Appendix D. Petitioner was charged in count one with violation of Title 18, United States Code

§1341 and §2, mail fraud and three counts of violating Title 26, United States Code §7206(1), the filing of a false income tax return.

On January 30, 1985, Petitioner pled guilty to the four count information and on May 3, 1985, a Judgment and Probation Commitment Order was entered and Petitioner was sentenced to a period of four years incarceration and a fine of $16,000. Petitioner served the sentence as ordered. The subject matter of this petition (and the appeal to the United States Court of Appeals for the Sixth Circuit) involves the validity of Petitioner's conviction on count one of the information which charged a violation of 18 U.S.C. §1341 based on what has commonly been referred to as the "intangible rights" mail fraud theory as expressly invalidated by this Court in 1987 pursuant to McNally v. United States.

Count one of the subject information (App. D) charged:

COUNT ONE

1. At all times material to this information:

(a) WILLIAM B. TANNER was president of William B. Tanner Company, Memphis, Tennessee.

(b) Ted Filipowicz was employed as Marketing Director for Munford, Incorporated (Majik Markets).

2. Beginning sometime prior to February 1, 1981, the exact date unknown, and continuing thereafter to on or about August 30, 1982, in the Western District of Tennessee, and elsewhere, WILLIAM B. TANNER, aided, abetted, counseled and induced by Ted Filipowicz, knowingly, wilfully and unlawfully devised and intended to devise a scheme and artifice to defraud Majik Markets of the honest and faithful services of Ted Filipowicz.

3. The scheme and artifice to defraud so devised by WILLIAM B. TANNER and Ted Filipowicz was in substance as follows:

(a) It was a part of the scheme and artifice to defraud that Ted Filipowicz would use his position as Marketing Director for Majik Markets to assure that William B. Tanner Company would receive

certain advertising business from Majik Markets.

(b) It was further a part of the scheme and artifice to defraud that Ted Filipowicz, pursuant to a prior agreement with WILLIAM B. TANNER, and in return for the Majik Market business as referred to in (a) above, would receive cash payments from WILLIAM B. TANNER.

(c) By virtue of the scheme and artifice to defraud, William B. Tanner Company and Ted Filipowicz were to profit financially by depriving Majik Markets of the honest and faithful services of its employee, Ted Filipowicz.

4. On or about July 1, 1982, in the Western District of Tennessee, the defendant,

---------WILLIAM B. TANNER--------

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did knowingly and wilfully cause to be placed in an authorized depository for mail matter a letter addressed to Contemporary Consultants, 3350 Millenocket Road, Marietta, Georgia 30062 to be sent and delivered by the U.S. Postal Service; in violation of Title 18, United States Code, Section 1341 and Section 2.

Following Petitioner's conviction and incarceration, this Court retroactively invalidated all convictions pursuant to the "intangible rights" mail fraud theory. Accordingly, Petitioner sought an order vacating the judgment of the conviction for violation of 18 U.S.C. §1341 and return of the $1,000 fine imposed as a result of said conviction by filing in the district court on May 5, 1989 a petition and affidavit in support of motion for writ of error coram nobis (Appendices E and E-1) pursuant to the All Writs Statute, 28 U.S.C. §1651. The Petition for Writ of Error Coram Nobis was assigned to the same district court judge that had sentenced Petitioner in May of 1985. The matter was extensively briefed by the United States and Petitioner as of record.

On or about November 19, 1992, some three and one-half years following the filing of the Petition for Writ of Error Coram Nobis, the district court ruled by memorandum opinion

dated November 19, 1992, that Petitioner's application should be denied.

Petitioner sought a timely appeal to the United States Court of Appeals for the Sixth Circuit although Petitioner's appeal was denied without opinion on or about October 21, 1993. (App. B) Petitioner then sought on November 4, 1993 a Petition for Rehearing in the United States Court of Appeals for the Sixth Circuit which was denied on November 23, 1993. (App. C).

Petitioner now seeks a Writ of Certiorari to reverse the judgment of the United States Court of Appeals for the Sixth Circuit as that court's decision as well as the decision of the district court is directly contrary to the express holding of this Court in McNally as well as other federal circuit decisions retroactively invalidating convictions pursuant to 18 U.S.C. §1341 based upon facts alleging deprivation of intangible rights. In McNally, this Court retroactively invalidated

convictions for mail fraud based upon an alleged deprivation of intangible rights, such as the honest, loyal and faithful services of an employee.

ARGUMENT

I. Petitioner's conviction pursuant to 18 U.S.C. §1341 is invalid pursuant to McNally as count one of the information failed to allege any deprivation of tangible property.

As of record, count one of the subject information alleged a deprivation of "intangible rights" and did not allege any deprivation of money or property; did not allege that Majik Markets was defrauded of money or property; and failed to allege that Majik Markets suffered any economic loss whatsoever. The charge at issue did not allege that Majik Markets would have paid a lower rate for advertising services or could have secured better advertising services in the absence of the alleged scheme. The only allegation is a loss by Majik Markets of the

honest and faithful services of their employee, Mr. Filipowicz.

In McNally, this Court held that a conviction pursuant to 18 U.S.C. §1341 is limited in scope to the protection of property rights as opposed to "intangible rights" and that an alleged scheme to defraud an employer of intangible rights, such as the honest, loyal and faithful services of an employee, fails to state a crime.

The substance of the charges in McNally involved an allegation that a public official owed a fiduciary duty to the public and that misuse of a public office for private gain is a fraud. In McNally, the indictment alleged that the defendants had devised a scheme (1) to defraud the citizens and government of Kentucky of their right to have the commonwealth's affairs conducted honestly, and (2) to obtain, directly and indirectly, money and other things of value by means of false pretenses and the concealment of material

facts. In substance, it was alleged that defendant Hunt had defacto control over Kentucky's selection of insurance agents and used that control to arrange for Wombell Insurance Agency to pay a portion of insurance premiums generated as a result of Hunt's control to companies or agencies designated by Hunt. It was alleged that in exchange for Kentucky's insurance business, commissions earned by the Wombell Agency in excess of $50,000 per year would be shared with other "agencies" specified by Hunt. Hunt thereafter arranged for the organization of other companies solely for receiving a share of the commissions resulting from Kentucky's purchase of insurance through the Wombell Agency. It is noteworthy that in invalidating the subject convictions in McNally, the Court assumed that Hunt was a state officer and accepted the government's contention that there was a resulting fiduciary duty to the public. Despite the alleged fiduciary duty, this Court

overturned the mail fraud conviction due to the fact that the indictment failed to allege a tangible loss.

In the present case, there was no allegation that Petitioner held public office or owed a fiduciary duty to Majik Markets. As such, Petitioner's conviction is far more compelling than the McNally holding.

It is noteworthy that for purposes of this Petition, the lower court specifically agreed and noted that the subject information was based solely upon the intangible rights mail fraud theory and that there was no reference to any deprivation of money, property, tangible or intangible, and that count one of the information "does not charge that Majik Markets was defrauded of money or property". (App. A, p. 17). The lower court further specifically noted the analogous fact situation between the Petitioner's information and the holding of McNally. (App. A, p. 13).

While the lower court specifically found that count one of the information failed to charge a deprivation of money or property, the court nevertheless denied the petition which is directly contrary to this Court's holding in McNally in which the court stated:

> The court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. [citations omitted.]
>
> As the Court said in a mail fraud case years ago, "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." [citations omitted]
>
> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read §1341 as limited in scope to the protection of property rights. If Congress desires to go further it must speak more clearly than it has.

McNally, 483 U.S. at 9-10.

In the present case as in McNally, there simply is no allegation of any tangible loss nor any factual allegation from which any tangible loss could reasonably be inferred. In fact there is no allegation that Majik Markets could have received better advertising at a better price or that Majik Markets paid a larger commission than agreed or customary or suffered any tangible loss. Accordingly, it is respectfully submitted that the holding of the lower courts are directly contrary to McNally and as such, Petitioner's conviction must be reversed since the charge for which Petitioner stands convicted fails to state a crime.

II. Conviction for conduct that does not constitute a crime is a fundamental error absolutely entitling Petitioner to post conviction relief.

i. The lower court, in denying Petitioner the requested relief improperly relied on Flippins v. United States, 747 F.2d 1089 (6th Cir. 1984) a pre-McNally decision.

As earlier referenced, this Court held without exception of caveat, that a conviction pursuant to 18 U.S.C. §1341 is invalid as a matter of law short of some allegation of a tangible loss. Despite the express holding of this Court, the lower courts denied the subject petition based upon the pre-McNally decision of Flippins v. United States, 747 F.2d 1089 (6th Cir. 1984) in which the Sixth Circuit Court of Appeals held that a fair statement of the basis for the granting of a writ of error coram nobis is demonstration of (1) an error of fact; (2) unknown at the time of trial; (3) of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known.

Petitioner submits in accordance with McNally, that a mail fraud conviction based upon the intangible rights theory absolutely entitles Petitioner to relief as conviction for conduct that is not a crime is a violation

of the most fundamental of all rights as held in United States v. Morgan, 364 U.S. 502 (1954). In Morgan, this Court held that while relief pursuant to writ of error coram nobis is limited in certain instances, fundamental errors of law absolutely entitle a Petitioner to relief. See for example, Davis v. United States, 417 U.S. 333 (1974) cited post McNally with approval in United States v. Stoneman, 870 F.2d 102 (3rd. Cir. 1989) holding:

> Those substantive errors which result in a person's charge and conviction for something not a crime are fundamental....A person charged in an indictment that did not include a loss of tangible rights or convicted by evidence that did not show a violation is punished for something not a crime and is entitled to collateral review. If a defendant were convicted and punished "for an act that the law does not make criminal [,t] here can be no room for doubt that such a circumstance `inherently results in a complete miscarriage of justice' and `present[s] exceptional circumstances' that justify collateral relief". Davis v United States, 417 U.S. 333, 94 S. Ct. 2298, 2305, 41 L. Ed.2d 109 (1974).

Stoneman, 870 F.2d at 105.

Consistent with the fundamental nature of an invalid conviction is the fact that the Sixth Circuit has expressly recognized the propriety of a writ of error coram nobis in numerous decisions, including challenges to mail fraud convictions as a result of McNally. See for example United States v. Norman, 391 F.2d 212 (6th Cir. 1968); Flippins v. United States, 747 F.2d 1089 (6th Cir. 1984); and Allen v. United States, 867 F.2d 969 (6th Cir. 1989). In each of these decisions, the Sixth Circuit has recognized the propriety of a writ of error coram nobis and recognized the fundamental nature of a conviction for conduct which does not constitute a crime. Accordingly, it is submitted that Petitioner is absolutely entitled to relief requested irrespective of the requirements of the Flippins decision if the challenged conviction fails to state a crime in compliance with McNally. This Petition is especially compelling since the lower court specifically

found that the subject information does not charge a tangible loss as required by McNally but nevertheless refused to expunge an admittedly improper conviction.

ii. Even assuming the requirements of Flippins are applicable the lower courts improperly interpreted same.

While Petitioner has submitted that conviction for conduct that does not constitute a crime absolutely and without further showing entitles a defendant to relief, it is submitted alternatively that even assuming Flippins is applicable, the lower court improperly interpreted and analyzed the third factor set forth in Flippins which is whether or not the error was of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known.

The lower court in reviewing the requirements of Flippins held that the third factor had not been met since Petitioner could have, and according to the lower court, would

have received the maximum incarceration whether or not Petitioner had been convicted on the challenged mail fraud count. Contrary to the lower court's holding, no authority exists to substantiate the lower court's interpretation of Flippins.

As of record, Petitioner's position is that the "outcome of the challenged proceeding" as referenced in Flippins is the very fact of the mail fraud conviction as opposed to whether Petitioner may have received comparable incarceration irrespective of the invalid mail fraud conviction. According to the lower court's ruling, coram nobis relief will never be available no matter how blatant the legal error if a defendant could have received comparable incarceration irrespective of a constitutionally invalid conviction nor would relief be available if no incarceration was involved. It is respectfully submitted that both the policy and rationale of the lower court is contrary

to established precedent of this Court and the United States Court of Appeals for the Sixth Circuit.

The lower court's ruling makes no reference to the fact that Petitioner stands convicted for conduct that simply is not a crime, that the Flippins decision was decided prior to retroactive invalidation of intangible rights mail fraud convictions in McNally or that the Sixth Circuit has held subsequent to Flippins that McNally must be applied retroactively since it involves a new interpretation of criminal law which has been the law for many years as established in Davis v. United States, 417 U.S. 333 (1974). The Davis case held that where an intervening change of law is such that the defendant was punished "for an act that the law does not make criminal," the new rule of law must be applied retroactively in post conviction proceedings. As required by both Davis and McNally, the Sixth Circuit in reliance on

Davis has ruled directly contrary to the ruling in Petitioner's case. See Callanan v. United States, 881 F.2d 229 (6th Cir. 1989) citing Davis and holding with reference to a McNally challenge:

> The case at bar involves not a new rule of criminal procedure, but a new interpretation of the substantive criminal law. In this the present case resembles Davis v. United States, 417 U.S. 333, 94 S. Ct. 2298, 41 L. Ed.2d 109 (1974), a decision indicating that where the intervening change of law is such that the defendant was punished "for an act that the law does not make criminal," the new rule of law must be applied retroactively in post-conviction proceedings.

Callanan, 881 F.2d at 231-232.

The Sixth Circuit in Callanan also cited with approval United States v. Johnson, 457 U.S. 537 (1982) and held that full retroactivity is a necessary adjunct to a ruling that a trial court lacked authority to commit or punish a criminal defendant in the first place. See Callanan, 881 F.2d at 232. In addition, the Callanan court in

interpreting McNally held that full retroactivity applies in post conviction proceedings. See Callanan holding:

> Subsequent to the district court's decision in this case, we applied McNally retroactively in direct appeals, see United States v.Stack, 853 F.2d 436, 437 (6th Cir. 1988), and in postconviction proceedings on a motion for a writ of error coram nobis. Allen v. United States, 867 F.2d 969 (6th Cir. 1989). Other courts of appeals have concluded uniformly that the rule of McNally must be applied retroactively in postconviction proceedings. See Ingber, 841 F.2d at 455; United States v. Osser, 864 F.2d 1056, 1058 '3d Cir. 1988); United States v. Mandel, 862 F.2d 1067, 1075 4th Cir. 1988), cert. denied, ---U.S.---, 109 S. Ct. 3190, 105 L. Ed.2d 699 (1989); Magnuson v. United States, 861 F.2d 166, 167 (7th Cir. 1988); United States v. Mitchell, 867 F.2d 1232, 1233 (9th Cir. 1989); Shelton, 848 F.2d at 1488-90.

Callanan, 881 F.2d at 232.

As such it is clear that the Sixth Circuit Court of Appeals has, consistent with McNally, held that post conviction proceedings such as a petition for writ of error coram nobis must, according to the authority of

McNally, be applied retroactively as in this case. Nevertheless, despite such rulings, the district and appellate courts denied the requested relief improperly and/or misinterpreted the requirements of Flippins.

No Sixth Circuit decision nor other decision located by Petitioner has interpreted the requirements of Flippins or even made mention of the primary factor relied upon by the lower court that Petitioner would have received comparable incarceration whether or not the mail fraud conviction was set aside. It is submitted that in each of the above cited cases the issue considered by the court was not whether Petitioner would have received comparable incarceration but whether the Petitioner's conviction would have existed had this fundamental error of fact been known. Clearly an assertion that an error of the most fundamental kind has been committed cannot be remedied by the fact that a defendant would

have been incarcerated whether or not the invalid conviction was set aside.

It is noteworthy that the Sixth Circuit has, subsequent to McNally, granted relief by setting aside and expunging improper mail fraud convictions despite the fact that the defendant remained convicted of other criminal counts that were the subject of the defendant's incarceration. In fact no authority has been located denying post-conviction relief due to the fact that a defendant's other convictions could have, irrespective of the invalid mail fraud conviction, resulted in comparable incarceration. Certainly no such authority was rendered in McNally.

The Sixth Circuit has previously held invalid mail fraud convictions despite the fact that a defendant's sentence has been served. No decision has been located that has even considered the deciding factor relied on by the lower court that a defendant could have

received comparable incarceration whether or not the mail fraud conviction was valid.

Accordingly, it is submitted that the lower court's opinion is totally unsupported by any authority and that the lower court misinterpreted Flippins and committed reversible error in finding that the outcome of the challenged proceeding probably would not have been changed since Petitioner could have received comparable incarceration whether or not convicted of mail fraud. Clearly, the outcome of the challenged proceedings would have been changed since count one of the information is facially invalid pursuant to McNally even according to the opinion of the lower court.

III. The lower court's finding that coram nobis relief is never available despite an admittedly invalid mail fraud conviction is directly contrary to not only authority of the Sixth Circuit but also of the very citations relied on by the lower court.

As an apparent additional basis for denying the requested relief, the lower court held that the subject mail fraud conviction, while admittedly failing to meet the requirements of McNally, should nevertheless not be invalidated or expunged by writ of coram nobis since Petitioner's sentence has been executed and there are no continuing civil disabilities not also caused by the three income tax convictions. (App. A, p. 27). According to the lower court's rationale, relief is never available to remedy an invalid mail fraud conviction if other felony charges exist since the other felonies continue to cause disabilities even if the mail fraud charge is set aside. Petitioner respectfully disagrees and relies not only on prior authority of the Supreme Court of the United States but also authority from the Sixth Circuit expressly recognizing the propriety of the writ where other unchallenged felony convictions exist.

Contrary to the ruling of the lower court, this Court has held that a writ of error coram nobis is available in criminal cases to correct errors of law of the most fundamental character. United States v. Morgan, 364 U.S. 502 (1954). While relief pursuant to a writ of error of coram nobis is limited, those fundamental errors of law absolutely entitle the movant to relief. As earlier stated, the lower court cites the fact that Petitioner has executed his sentence as one basis for denial of the writ despite the fact that the defendant in Morgan pled guilty to a federal charge just as Petitioner, was sentenced to imprisonment just as Petitioner, and in fact served his sentence just as Petitioner. In a situation very similar to the present, the Court held:

> Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think

> Respondent is entitled to an opportunity to attempt to show that this conviction was invalid.

Morgan, 364 U.S. at 512.

Contrary to the holdings in this case, the Sixth Circuit has expressly recognized the propriety of a writ of error coram nobis in United States v Norman, 391 F.2d 212 (6th Cir. 1968); Flippins v. United States, 747 F.2d 1089 (6th Cir. 1984) and Allen v. United States, 867 F.2d 969 (6th Cir. 1989). In each of these decisions, the Sixth Circuit has approved issuance of a writ of error coram nobis.

In Norman, the defendant entered a plea of guilty in the district court and was sentenced to imprisonment of one year and one day and served the sentence. Approximately 14 years following his guilty plea, Norman filed a writ of error coram nobis which the district court denied. On appeal, the Sixth Circuit Court of Appeals held:

> The writ is sufficient to invoke the jurisdiction of a court to set aside its judgment of conviction even when sentence has been fully served.

Norman, 391 F.2d at 213.

The court entertained Norman's petition for writ of error coram nobis despite the fact that Norman entered a guilty plea, served the sentence, and allowed some 14 years to pass prior to filing the subject petition. Despite the Norman decision which granted relief even prior to McNally, the lower courts denied relief in this case after specifically finding that the Petitioner's charge did not comply with McNally.

In Flippins, an inmate filed a petition for writ of error coram nobis. The petition was summarily dismissed by the district court and the Sixth Circuit Court of Appeals held that the district judge erred in summarily dismissing the petition holding:

> The writ of error coram nobis is available to a convicted criminal at anytime following the entry of

> judgment against him or her. A writ of error coram nobis may be sought where, as here, the challenged sentence has been completely served.
>
> Under coram nobis the court reviews errors of fact committed in the original proceeding which are "of the most fundamental character, that is, as rendered the proceeding itself invalid."

Flippins, 747 F.2d at 1091 (citations omitted). Thus, according to Flippins, the issuance of a writ of error coram nobis is proper in the case of fundamental errors of law. It has been previously noted that the lower court specifically found that Petitioner stands convicted of a charge that is invalid pursuant to McNally, yet despite that finding denied the writ contrary to the authority of McNally, Norman, and Flippins.

Also recognizing the propriety of a writ of error coram nobis is Allen v. United States, 867 F.2d 969 (6th Cir. 1989) in which defendant Allen was convicted on six counts of mail fraud and one count of conspiracy. The court likewise found in that case that the

subject indictment failed to comply with the requisites of McNally and reversed the mail fraud convictions. In fact the Sixth Circuit has consistently recognized the propriety of a writ of error of coram nobis despite the fact that the sentence has been served and thus the lower court's reliance on such fact in denying this Petition was erroneous.

The lower court also cites United States v. Osser, 864 F.2d 1056 (3rd Cir. 1988) and United States v. Doe, 867 F.2d. 986 (7th Cir. 1989) in denying Petitioner the requested relief. In reliance on these decisions the lower court holds:

> [I]n other cases, the continuing civil disability is a factor in determining whether the writ should issue. (App. A, p. 21).

The lower court goes on to state that Petitioner's petition should be denied because

> there are no continuing civil disabilities not also caused by the three felony income tax convictions. (App. A, p. 27).

Petitioner submits that the lower court erred in holding that Petitioner's writ should be denied since the remaining tax convictions are valid and thus setting aside the mail fraud conviction would not do away with the other convictions and their "disability". In effect the lower court held that a writ of error coram nobis may never issue unless the challenged conviction is the only conviction which is directly contrary to established precedent.

Despite the opinion of the lower court, no Sixth Circuit opinion has adopted the requisites of Osser and Doe. In fact, established precedent of the Sixth Circuit are directly contrary to the lower court's holding. See for example Norman, Allen, Flippins and Callanan all of which recognize the propriety of a writ of error coram nobis without any requirement of continuing civil disabilities in a case of a fundamental error. Nevertheless, even should this Court find the

authority of Doe and Osser to be applicable, Petitioner is entitled to relief.

As earlier stated Petitioner submitted in support of the subject petition an affidavit stating that the results of the mail fraud conviction persist and while Petitioner was never granted oral argument nor an opportunity to present evidence as to the disabilities set out in Petitioner's affidavit, the sworn statements in Petitioner's affidavit remain of record and uncontroverted. (App. E1).

Irrespective of the Petitioner's lack of opportunity to present evidence on the subject of continuing disabilities, the lower court's interpretation of these decisions is directly contrary to Osser and Doe, the very authority relied on by the lower court in denying the requested relief. See for example Osser wherein the defendant was convicted on seven counts of mail fraud, one count of conspiracy to commit mail fraud and one count of obstruction of justice. Osser did not seek to

overturn on appeal his conviction for obstruction of justice. The court nevertheless entertained the appeal and denied same based on a finding that the mail fraud charges met the requisites of McNally.

Despite the fact that the defendant in Osser had unchallenged felony convictions just as Petitioner in this case, the lower court incorrectly relies on Osser for the proposition that Petitioner's requested relief should be denied due to the fact of other unchallenged felony convictions. As is clear, the lower court's interpretation is directly contrary to Osser itself as the Osser court did not rely on or even mention Osser's unchallenged obstruction conviction as a basis for denying the requested relief but rather held:

> Osser's conviction can be properly aligned with those post-McNally decisions where Courts of Appeals have held that a charge and evidence of monetary or property loss will sustain a conviction for mail fraud, even if the intangible

> rights theory was presented as an alternative basis for conviction.

Osser, 864 F.2d at 1063. Thus, clearly the lower court's reliance on Osser for the proposition that coram nobis relief is not available to challenge an intangible rights mail fraud conviction when a defendant has other felony convictions is misplaced.

Further, contrary to the lower court's opinion, Osser specifically found that coram nobis relief is available to correct errors "of the most fundamental character" and that "...it appears to us that an assertion that a conviction was based on conduct not covered by a criminal statute class is of a fundamental character." See Osser, 864 F.2d at 1059.

In discussing the availability of coram nobis relief, the Osser court indicated that some consequences of a conviction must exist to grant relief but held that those "disabilities" or consequences may be of a

type that exist as the result of any felony conviction, to wit:

> For example we, noted in Cariola that the denial of a right to vote or the subsequent imposition of a sentence heavier than would otherwise have been appropriate represents a collateral legal disadvantage that survives the satisfaction of a sentence.

Osser, 864 F.2d at 1059.

The Osser court also relied on Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987) wherein the Ninth Circuit "seemed to adopt a presumption that collateral consequences flow from any criminal conviction." In Hirabayashi, the court found the requirement was satisfied even on a misdemeanor. Osser, 864 F.2d at 1060. While the Osser court ultimately denied the relief requested, it was only after a finding that the charges met the requirements of McNally as opposed to the proposition that other unchallenged felony convictions existed.

Thus, contrary to the finding of the lower court, the Osser decision does not prevent nor discourage the availability of coram nobis relief in situations such as Petitioner's where other unchallenged felony convictions exist. Such was the case in Osser, wherein the Court recognized the "fundamental nature" of a challenge to an intangible rights mail fraud conviction. Also see United States v. Stoneman, 870 F.2d 102 (3rd Cir. 1989) citing Osser:

> As in Osser, the question here is whether an error in jury instructions under McNally is a fundamental error justifying vacation of a final conviction on collateral review by issuance of a writ of error coram nobis.
>
> Those substantive errors which result in a person's charge and conviction for something not a crime are fundamental....If a defendant were convicted and punished "for an act the law does not make criminal [,t]here can be no room for doubt that such a circumstance `inherently results in a complete miscarriage of justice' and `presents exceptional

> circumstances' that justify collateral relief."

Stoneman, 870 F.2d at 105 (citations omitted).

Also, contrary to the lower court's ruling in this case is United States v. Doe, 867 F.2d 986 (7th. Cir. 1989) wherein defendant was convicted of mail fraud, racketeering and obstruction of a criminal investigation. The defendant challenged the mail fraud conviction based upon McNally by the filing of a writ of error coram nobis but did not challenge the other felony convictions. The Doe court ultimately denied the requested relief after a finding that the indictment charged a scheme to deprive the victim of property rights. See Doe, 867 F.2d at 1089. The Doe court did not assert, as the lower court has in this case, that the mere fact that other convictions would persist is a basis for denial of the petition and held:

> The failure of an indictment to state an offense resulting in "conviction and punishment...for an act that the law does not make

> criminal," is a circumstance which triggers the right to habeas corpus relief.

Doe, 867 F.2d at 988.

IV. The lower courts finding that coram nobis relief is not available following a failure to seek a direct appeal is incorrect as a matter of law.

Clear precedent exists for the proposition that a defendant's failure to raise established substantive issues on direct appeal asserting the invalidity of an intangible rights mail fraud conviction is not a basis for denial of relief in circumstances where as here there has been a substantive change in criminal law. See Callanan v. United States, 881 F.2d 229 (6th Cir. 1989) holding it unnecessary to challenge on direct appeal settled points of law and that failure to do so is not fatal. There the court held:

> Before McNally, it was settled law in this circuit (and in every circuit that had considered the issue) that the mail fraud statute permitted prosecutions based on the intangible rights theory ... The "cause" requirement of Frady should

> not be applied in a way that would encourage efforts to relitigate well settled points of law...and the fact that the point appeared to be settled constituted cause for not raising it. There is a strong argument, moreover, that cause need not be shown at all in these unusual circumstances.

Callanan, 881 F.2d at 231.

Accordingly, it is clear that the lower courts erred in denying the Petition for Writ of Coram Nobis in this case due to Petitioner's failure to raise a direct challenge to the subject mail fraud conviction as specifically held in Callanan. As is clear from the cases cited, no court has sustained the lower court's position that such a fundamental error should be overlooked due to failure to raise on direct appeal in light of the change in substantive law.

CONCLUSION

The Petitioner herein respectfully submits that this Court should entertain the present Petition for Writ of Certiorari as the issues involved literally encompass the very

infrastructure of due process and the constitutional rights of all persons charged with crimes by the federal government. To even suggest that a defendant should be denied relief in a situation where the very court denying the relief actually agrees that the conviction was fundamentally flawed pursuant to McNally is directly contrary to established precedent. Should this Court decline to entertain this petition, federal circuits will be encouraged to continue to seek to create numerous exceptions to McNally and to erode the very heart of a decision that protects the most fundamental of all rights -- the right to attack facially improper convictions where the conduct charged has been specifically found to fail to state a crime.

Since this Court's 1987 decision of McNally, there have been systematic rulings seeking to avoid or limit the relief mandated by McNally. Numerous varying opinions exist as to the availability of relief in cases of

fundamental rights and as such this Court should entertain and grant this Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, J. N. Raines, a member of the Bar of this Court, pursuant to Rule 29 of the Supreme Court Rules, certify that the Petition for Writ of Certiorari has been mailed on February 817, 1994, via the United States mail service, with first class postage prepaid, to all parties required to be served as follows:

Steve Parker, Assistant United States Attorney
Federal Building
167 North Main, 10th Floor
Memphis, Tennessee, 38103

Hon. Drew S. Days, III
Solicitor General
Department of Justice
10th Street & Constitution Ave. N.W.
Rm. 5143
Washington, D.C., 20530

J. N. Raines

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WILLIAM B. TANNER,

Petitioner,

VS. No. 89-2448-4BRO
(Cr. No. 85-20030-M)

UNITED STATES OF AMERICA,

Respondent.

RULING ON PETITION FOR
WRIT OF ERROR CORAM NOBIS

This ruling pertains to a Petition for Writ of Error Coram Nobis (hereinafter the Writ) filed by attorneys for William B. Tanner (hereinafter Tanner or petitioner or defendant), after the defendant had completely served his sentence. The petition seeks to have this Court declare invalid the guilty plea conviction of Tanner of one count charging mail fraud in a four-count information. It is sought to be invalidated under the doctrine of McNally v. United

States, 483 U.S. (1987), which held that a scheme to defraud an employer of intangible rights as opposed to money or property rights, was not covered by the mail fraud statute. The McNally case resulted in a flood of litigation seeking to set aside mail fraud convictions. Allen v. United States, 867 F.2d 969 (6th Cir. 1989). Furthermore, the holding in McNally, is retroactive. Callanan v. United States, 881 F.2d 229 (6th Cir. 1989).

Soon after the petition in this case was filed, the government responded by denying that the Writ was applicable to the facts of this case and by further asserting that McNally was not applicable to the facts of this case. The McNally opinion prompted numerous opinions from district and circuit courts as well as some subsequent Supreme Court rulings. This caused the briefing on the petition in this case to be extended well up into 1991. The complexities of the issues and the sparsity of the current law on this

ancient common law writ have delayed the ruling of this Court on the petition.

BACKGROUND

Tanner, at the time of his conviction by guilty plea, was 54 years of age. He was born and raised in Missouri, but he had been a successful businessman by lawful and unlawful means primarily in Memphis, Tennessee. He formed the William B. Tanner Company which offered services to businesses, large and small, throughout the United States whereby the primary service was furnishing the copy and tape or print for commercial advertising by radio and television. In addition to producing the advertising product for broadcast through the media, Tanner and his company accumulated a hidden inventory of time on radio and television stations which enabled the Tanner Company to offer the tape or print containing the advertising commercial to media outlets that were obligated to furnish customers of Tanner time on its stations.

The success of Tanner and his company attracted the attention of Media General, Inc., a larger national corporation which dealt in bringing together companies who wished to advertise and the media who offered advertising time. After negotiations, Media General purchased Tanner's company for millions of dollars with an agreement that he would continue to serve Media General, particularly its Tanner division.

After a complaint from a representative of the Thomas J. Lipton Company, which company had been a customer of the Tanner Company, an investigation was commenced and pursued through a former employee of the Tanner Company who provided broad information concerning allegedly illegal pay-offs to employees of customers of Tanner Company. This investigation disclosed that there were three persons in the Tanner Company who were familiar with the clandestine activities. They were said to have access to secret files

that would disclose fraudulent schemes. Based upon a very comprehensive affidavit, a search warrant for the entire building where the Tanner Company was housed was issued. Numerous law enforcement agents were assigned to the search of the multi-story building, and the secret files were found. The records disclose that there was an overall practice whereby the Tanner Company would bribe officials of customers of the Tanner Company, such as Lipton Tea, whereby substantial amounts of cash were given to the director of marketing or advertising in exchange for seeing that the Tanner Company continued to have the advertising business of the company for whom the dishonest employee worked. In some instances, the pay-offs were with expensive automobiles or very expensive fur coats or a year's tuition to a son's or daughter's college. The cash distributions were made to a dummy corporation which was headed by the

dishonest employee, who withdrew funds from the dummy corporation.

The search of the building also disclosed that the company had a hidden inventory of radio spots amounting to millions of dollars. The presentence report reflects that the Internal Revenue Service claimed that Tanner individually understated his income by more than $322,000 for the years in question. The three income tax counts of the information against Tanner were based on false statements of income for the calendar years 1979 (Count 2), 1980 (Count 3) and 1981 (Count 4). All three of these counts carried penalties of not more than three years each plus not more than $5,000 fine or both.

The Mail Fraud Charge

The pertinent parts of the mail fraud count provided as follows:

> Ted Filipowicz was employed as Marketing Director for Munford, Incorporated (Majik Markets).

2. Beginning sometime prior to February 1, 1981, the exact date unknown, and continuing thereafter to on or about August 30, 1982, in the Western District of Tennessee, and elsewhere, WILLIAM B. TANNER, aided, abetted, counseled and induced by Ted Filipowicz, knowingly, wilfully and unlawfully devised and intended to devise a scheme and artifice to defraud Majik Markets of the honest and faithful services of Ted Filipowicz.

3. The scheme and artifice to defraud so devised by WILLIAM B. TANNER and Ted Filipowicz was in substance as follows:

(a) It was a part of the scheme and artifice to defraud that Ted Filipowicz would use his position as Marketing Director for Majik Markets to assure that William B. Tanner Company would receive certain advertising business from Majik Markets.

(b) It was further a part of the scheme and artifice to defraud that Ted Filipowicz, pursuant to a prior agreement with WILLIAM B. TANNER, and in return for the Majik Market business as referred to in (a) above, would receive cash payments from WILLIAM B. TANNER.

(c) By virtue of the scheme and artifice to defraud, William B. Tanner Company and Ted Filipowicz were to profit financially by depriving Majik Markets of the honest and faithful services of its employee, Ted Filipowicz.

Numbered paragraph 4 of Count 1 charged that William B. Tanner for the purpose of

executing the scheme to defraud caused to be placed in an authorized depository for mail matter a letter addressed to Contemporary Consultants in Marietta, Georgia. This was the allegation of the necessary mailing to consummate the violation of 18 U.S.C. § 1341. Contemporary Consultants was a company set up by Mr. Filipowicz to receive funds and the government was prepared to prove that the mailing contained a check to Contemporary Consultants for $18,549 from Tanner or his company. That money would have been distributed to Mr. Filipowicz at a later date.

On January 3, 1985, the four-count information was filed in open court at which time Tanner plead guilty to all four counts pursuant to a plea agreement which contained in addition to other provisions the following:

> (4) Any sentence shall not exceed a fine of $16,000 and a period of incarceration of four years, with the proviso that the defendant might ask for probation with special conditions short of incarceration.

The not to exceed fine of $16,000 was based upon a statutory maximum fine of $1,000 on the mail fraud count, and $5,000 each on the income tax counts. The statutory maximum sentence of incarceration on the mail fraud count was five years and on the tax counts, 3 years each, for a total possible period of incarceration of nine years.

The Sentence

On May 3, 1985, a sentencing hearing was held at which time the defendant and his two attorneys, James Neal and Cono Namorato, appeared. Elaborate preparations had been made by the attorneys for the defendant and by others employed to present reasons why the defendant should not be incarcerated. A privately produced presentence report was submitted by the National Center on Institutions and Alternatives. Numerous letters in support of the defendant were given primarily from organizations who had benefited from the philanthropy of Tanner. This

information was released to the local news media and published in advance of the hearing which prompted considerable protests against the possibility of Tanner not being incarcerated because he had shared his ill-gotten gains with worthy organizations.

Based upon the information that the Court had learned concerning Tanner from the presentence reports prepared by the Probation Office and the private organization as well as information the Court had learned from handling guilty pleas in four related cases against directors of advertising or directors of marketing for other companies who dealt with Tanner, the Court read into the record remarks concerning the sentence which pointed out the factors that were favorable and unfavorable to a period of incarceration.

In those remarks one of the cases that the Court had heard on a guilty plea was explained. That case was United States v.

Alberts, No. 85-20069.[1] Alberts entered a guilty plea to criminal responsibility with Tanner to defraud the Department of the Treasury in the collection of taxes owed by Tanner or his company and to defraud Sterling Drug of the honest and faithful services of its employee Alberts. The record reflects that Tanner paid Alberts $90,000 through a dummy corporation over a period of less than six months to secure his assistance in obtaining certain advertising business from the employer of Alberts, namely Sterling Drugs. The last payment was July 15, 1983, the month before the search warrant which caused the cessation of this type fraud was served. At the time of the hearing the Court learned that Mr. Alberts had been dismissed by Sterling Drugs, was unable to market his

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[1] Because the undersigned judge had authorized the search warrant which commenced the case, the Tanner case itself and all related cases were assigned to the same judge, who handled approximately fifteen criminal cases which were Tanner related, all on guilty pleas.

expertise and was doing maintenance work in a family-owned hotel at the time.

The Court also noted that the Court had received correspondence concerning the sentence of Tanner from an official of the Lipton Tea Company in which it was explained that the company had sued William B. Tanner and his company for millions of dollars in the form of bribes. The letter explained that one of their claims was based upon an allegation that commencing in 1975, Tanner paid a Lipton employee $50,000 every year to insure that William B. Tanner Company would retain certain advertising business from Lipton. This practice continued throughout 1982, which caused the Lipton Company to claim against Tanner and his company as well as Media General the sum of $400,000 for this one individual whose name was Kaufman. These facts were confirmed by a guilty plea of Mr. Kaufman to an information in this Court on April 11, 1985.

The sentencing remarks of the Court also took note of the fact that after the search warrant was served, Tanner was defiant, bitter and determined to show that he had done nothing wrong. He also undertook to have his co-conspirators or former co-workers destroy evidence to help him "beat the rap."

Applicability of McNally
to the Facts of this Case

For the reasons that will be hereinafter stated, the Court will deny the application for the issuance of a writ to invalidate Count 1 of the information; however, at the outset, the Court hereby notes the analogous fact situation between this case and the holding of McNally. The Supreme Court in McNally held that conduct which charged that a scheme or artifice to defraud the government of the honest services of its employees did not come within the statutory prohibitions of 18 U.S.C. § 1341. McNally concluded that intangible rights were not covered, but money or property

rights were. Later in Carpenter v. United States, 484 U.S. 19 (1987), the Supreme Court clarified McNally and found that intangible property rights in confidential information obtained for a newspaper were included in scope the of the mail fraud statute.

In Allen v. United States, 867 F.2d 969 (6th Cir. 1989), the Court of Appeals affirmed the granting of a writ of error coram nobis to a defendant who had been tried and found guilty of mail fraud with former governor Ray Blanton of the state of Tennessee. The Court noted that the Supreme Court in McNally pointed out that the indictment had charged a scheme to defraud the citizens of Kentucky of their right to have the commonwealth's affairs conducted honestly. In Allen, the indictment charged deprivation of the citizens of Tennessee of intangible rights due from state officials. The Court of Appeals considered whether or not the indictment in Allen contained the elements of the offense charged

and whether it fairly informed the defendant of the charges against which he must defend. The court determined that McNally required the jury to find that the state was defrauded of money or tangible or intangible property having a value and the indictment did not contain a money and property rights mail fraud charge.

In the instant case, the information charged Tanner with devising or intending to devise a scheme or artifice to defraud Majik Markets of the honest and faithful services of Ted Filipowicz. It is further charged that it was a "part of the scheme and artifice to defraud that Ted Filipowicz, pursuant to a prior agreement with William B. Tanner and in return for Majik Market business as referred to above, would receive cash payments from William B. Tanner." It is further charged that by virtue of the scheme and artifice to defraud, William B. Tanner and Filipowicz were to profit financially by depriving "Majik

Markets of the honest and faithful services of its employee Ted Filipowicz." There is no reference to any deprivation of money or property, tangible or intangible, from Majik Markets. It was the position of Tanner throughout the proceedings that he was paying Filipowicz and others what amounted to a "finder's fee" of Tanner funds and Majik Market did not suffer any monetary loss.[2] On the other hand, there have been oral assertions by the government and allegations by Lipton Tea in civil litigation that the scheme to defraud by the payment of sizeable amounts of money or tangible property to employees in order to keep the advertising business with Tanner amounted to a cost of the product which Tanner recouped in the price charged to the employer for the advertising

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[2] Instead of a "finder's fee," the term should have been a "keeper's fee" because the agreement was the that marketing director would see that his employer was kept as a customer of the Tanner Company. The company was already found when the scheme was instituted.

product. This Court concludes, however, that Count 1 of the information does not charge that Majik Market was defrauded of money or property.

While it is true that Allen, was granted a writ of error coram nobis in a McNally type case, no issue was raised about the propriety of a writ being used to invalidate the mail fraud convictions.

Propriety of Issuing a Writ of Error Coram Nobis in the Instant Case

The attorneys for both the petitioner and the respondent cite United States v. Morgan, 346 U.S. 502 (1954), as being authoritative on the applicability of a writ coram nobis. In that case, the petitioner had been convicted of a crime in the New York state courts in 1950, where his sentence was increased because he had pleaded guilty to a federal charge in 1939. The procedures and controlling authority in New York did not permit a collateral attack to be made upon a federal

charge in the state courts; therefore, Morgan was forced to file a petition for a writ of coram nobis in the district court where he had been sentenced on his guilty plea eleven years earlier. The district court treated the application for a writ as a 28 U.S.C. § 2255 motion and dismissed it because the petitioner was not in prison for the charge at the time of filing. The Court of Appeals for the Second Circuit reversed because the 2255 motion did not supersede the common-law right for a writ of coram nobis which had been incorporated in the All Writs Act presently set forth in 28 U.S.C. § 1651. The Supreme Court in Morgan noted that the writ was available at common law to correct errors of fact. On page 505 the Supreme Court said: "In behalf of the unfortunates, federal courts should act in doing justice if the record makes a plain right to relief." The Court further stated:

> Continuation of litigation after

> final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice.

The Court noted that the issue in that case was to determine whether a conviction was invalid because the defendant in a criminal trial had not properly waived his right to an attorney. The Court further noted that there was a presumption that proceedings were correct and Morgan had the duty to overcome the presumption. The Court did rule that Morgan should be given the right in the court below to try to overcome the presumption because a federal trial without competent and intelligent waiver of counsel bars a conviction. The Court noted that this would be an error of the most fundamental character if proven.

Three years before McNally was handed down, the Court of Appeals for the Sixth

Circuit in Flippins v. United States, 747 F.2d 1089 (1984), stated as follows:

> The writ of error coram nobis is available to a convicted criminal at any time following the entry of judgment against him or her. A writ of error coram nobis may be sought where, as here, the challenged sentence has been completely served. The court's scope of review of the challenged judgment on a petition for writ of error coram nobis is of limited scope. Under coram nobis the court reviews errors of fact committed in the original proceeding which are "of the most fundamental character, that is, such as rendered the proceeding itself invalid.
>
> [4] The Eighth Circuit has interpreted this standard to require that at a minimum such is not to be granted "unless it is probable that a different result would have occurred had the supposed error of fact been known to the trial court." A fair statement of the basis for granting a writ of error coram nobis is demonstration of (1) an error of fact, (2) unknown at the time of trial, (3) of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known. (Citations omitted.)

In Flippins, the petitioner sought a writ of coram nobis to remove a federal conviction which later caused additional punishment in the Kentucky courts under the "Persistent

Felony Offender Statute." The federal charge was a felon in possession of a firearm. The petitioner claimed that he was coerced by court-appointed counsel to plead guilty and that counsel's assistance during the trial was otherwise deficient. The Court of Appeals found that the petitioner was entitled to an evidentiary hearing to determine whether the court-appointed attorney properly investigated the validity of a challenged Kentucky conviction which was the basis for two federal felon in possession firearms convictions.

It is noteworthy that in other cases, the continuing civil disability is a factor in determining whether the writ should issue. In U.S. v. Doe, 867 F.2d 1986 (7th Cir. 1989), the Court of Appeals for the Seventh Circuit noted that in order to justify issuing a writ of coram nobis, the petitioner must demonstrate (1) that the claim could not have been raised on direct appeal, (2) that the conviction produces lingering civil

disabilities and (3) that the error is the type of defect that would have justified habeas corpus relief pursuant to 28 U.S.C. § 2255. In that case the writ was dismissed because there was no showing that the error would justify habeas corpus release.

In U.S. v. Osser, 864 F.2d 1056 (3rd Cir. 1988), a post McNally case, the court noted on page 1059 that the writ coram nobis is "reserved for exceptional circumstances." The court further noted that the writ does not apply in civil cases as it did in common law and that a conviction based upon conduct not covered by a criminal statute is of a fundamental character, which is one of the factors referred to in Morgan. The Osser court also noted "that coram nobis relief is not available if a sentence has been executed unless the conviction carries continuing penalties," such as denial of a right to vote, loss of a license to practice law or the right to bear arms. In that case, the Court denied

the writ coram nobis even though a conviction may have been premised in part on allegations that citizens had been deprived of government employees' honest and impartial services.

There is one other matter that was alluded to in the memoranda concerning the issuance of the writ. The Court has reference to the possibility of a continuing liability because of the civil litigation which Tanner's conduct spawned. The Court does not consider that a factor in determining whether the writ should be issued in this case. First, the Court does not believe that the validity of the mail fraud count in this criminal proceeding resolved Tanner's civil liability for his conduct in the schemes. While it is true that Media General and Lipton Tea had sued Tanner under RICO, which requires civil proof of crimes, the mail fraud conviction in this case was not necessary to the right of the plaintiffs to recover in those civil cases. Furthermore, the Court is informed and

verily believes that the civil litigation has been settled. It may have been when the petition for writ was filed that counsel for Tanner thought it would help them in bargaining with the plaintiffs in civil litigation for a settlement that the invalidity of the mail fraud count would have been of some assistance. This Court does not indulge in speculation in that regard.

Going back to the three bases set forth in Flippins v. United States, 747 F.2d at page 1091, the Court will now consider them. Basis 1 is whether an error of fact has been demonstrated. An error of fact can exist by virtue of conduct that does not apply under the statute. The Court concludes in this case that there was an error of fact, namely that "depriving Majik Markets of the honest and faithful services of its employee, Ted Filipowicz" was covered by the mail fraud statute. Basis 2 is whether it was unknown at the time of trial (conviction by guilty plea).

Clearly this was unknown. The Office of the United States Attorney who prepared the information prepared it in the same fashion that the office in the Western District of Tennessee and other United States Attorneys' offices had based mail fraud charges on depriving an employer of the honest and faithful service of the employee without problems. Counsel for the defendant also felt that the facts justified a guilty plea on the charge in the information and the defendant himself after being advised by his counsel sincerely believed that the was pleading guilty to the crime set forth in the information and that it was in fact his own crime. The third basis set forth in Flippins is whether or not the error was of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known. The Court concludes that it definitely would not have altered the outcome of the challenged

proceeding if it had been known. This was a plea pursuant to a written plea agreement which was voluntarily entered into by the defendant after advice from able retained counsel. It was undoubtedly made in good faith. If the Court had known or suspected that Count 1 was invalid, the Court could have and would have assigned the punishment in the possible nine years which composed the three tax counts so that the defendant would have been sentenced to the maximum of four years as set forth in the plea agreement. For reasons heretofore indicated and based upon the complete record in this proceeding, the Court concluded that the case demanded that the maximum of four years incarceration authorized by the plea agreement should be awarded. It would have been a very simple thing and well within the law to have given three years on Count 2, three years on Count 3 with one year consecutive to the three years in Count 2 and the remaining two years concurrent with Count

2 and the three years in Count 4 concurrent with Count 2.

Even though the case has joined thousands of other cases which charged mail fraud crimes and received convictions thereon prior to McNally, the mail fraud count is not entitled to be invalidated and expunged by a writ coram nobis as a matter of right. Tanner's sentence has been executed, and there are no continuing civil disabilities not also caused by the three felony income tax convictions. Tanner is not an unfortunate for whom the federal courts should act in doing justice by issuing a writ coram nobis because the record has made a plain right to relief; nor has Tanner shown that the criminal litigation should be continued after final judgment and waiver of the statutory right of review by the extraordinary remedy of issuing a writ of coram nobis under circumstances compelling such action to achieve justice as taught by

the Supreme Court in United States v. Morgan, 346 U.S. at p. 505.

For all of the above reasons, the Court concludes and holds that the Petition for Writ of Error Coram Nobis is denied.

ENTER: This 17th day of November, 1992.

/s/ Robert M. McRae
ROBERT M. McRAE
SENIOR UNITES STATES
DISTRICT JUDGE

Case No. 93-5449

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

WILLIAM B. TANNER,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent- Appellee

BEFORE: NELSON and NORRIS, Circuit Judges; HEYBURN, District Judge.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore **ORDERED** that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

*--------
The Honorable John G. Heyburn, District Judge for the Western District of Kentucky, sitting by designation.

Case No. 93-5449

UNITED STATES COURT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

WILLIAM B. TANNER,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent- Appellee

BEFORE: NELSON and NORRIS, Circuit Judges; HEYBURN, District Judge*.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

D1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Cr. No. 85-20030-M
18 U.S.C. §1341
18 U.S.C. §2
26 U.S.C. §7206(1)

WILLIAM B. TANNER,

Defendant.

INFORMATION

THE UNITED STATES ATTORNEY CHARGES:

COUNT ONE

1. At all times material to this information:

(a) WILLIAM B. TANNER was president of William B. Tanner Company, Memphis, Tennessee.

(b) Ted Filipowicz was employed as Marketing Director for Munford, Incorporated (Majik Markets).

2. Beginning sometime prior to February 1, 1981, the exact date unknown, and

continuing thereafter to on or about August 30, 1982, in the Western District of Tennessee, and elsewhere, WILLIAM B. TANNER, aided, abetted counseled and induced by Ted Filipowicz, knowingly, wilfully and unlawfully devised and intended to devise a scheme and artifice to defraud Majik Markets of the honest and faithful services of Ted Filipowicz.

3. The scheme and artifice to defraud so devised by WILLIAM B. TANNER and Ted Filipowicz was in substance as follows:

(a) It was a part of the scheme and artifice to defraud that Ted Filipowicz would use his position as Marketing Director for Majik Markets to assure that William B. Tanner Company would receive certain advertising business from Majik Markets.

(b) It was further a part of the scheme and artifice to defraud that Ted Filipowicz, pursuant to a prior agreement with WILLIAM B. TANNER, and in return for the Majik

Market business as referred to in (a) above, would receive cash payments from WILLIAM B. TANNER.

(c) By virtue of the scheme and artifice to defraud, William B. Tanner Company and Ted Filipowicz were to profit financially by depriving Majik Markets of the honest and faithful services of its employee, Ted Filipowicz.

4. On or about July 1, 1982, in the Western District of Tennessee, the defendant, ----------WILLIAM B.TANNER---------- for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did knowingly and wilfully cause to be placed in an authorized depository for mail matter a letter addressed to Contemporary Consultants, 3350 Millenocket Road, Marietta, Georgia 30062 to be sent and delivered by the U.S. Postal Service; in violation of Title 18, United States Code, Section 1341 and Section 2.

COUNT TWO

On or about the 17th day of August, 1980, in the Western District of Tennessee.

----------WILILAM B. TANNER----------

a resident of Memphis, Tennessee, did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar 1979, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported taxable income in the amount of $240,488.00, whereas, he then and there well knew and believed, he received substantial taxable income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

COUNT THREE

On or about the 18th day of October,

1981, in the Western District of Tennessee,

----------WILLIAM B. TANNER----------

a resident of Memphis, Tennessee, did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1980, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported taxable income in the amount of $483,674.00, whereas, as he then and there well knew and believed he received substantial taxable income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1):

COUNT FOUR

On or about the 18th day of October, 1982, in the Western District of Tennessee,

----------WILLIAM B. TANNER----------

a resident of Memphis, Tennessee, did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1981, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported taxable income in the amount of $544,583.00, whereas, as he then and there well knew and believed, he received substantial taxable income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

Dated: January 30,1985

/s/ W. Hickman Ewing, Jr.
W. Hickman Ewing, Jr.
United States Attorney
Western District
of Tennessee

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,

Plaintiff,

v. No. 85-20030-M
Oral Argument Requested

WILLIAM B. TANNER,

Defendant.

PETITION FOR WRIT OF ERROR CORAM NOBIS

COMES NOW Petitioner, William B. Tanner, by and through counsel and would respectfully show unto the court as follows:

1. Petitioner is the Defendant named in the above-entitled cause.

2. On January 30, 1985, Information No. 85-20030-M, entitled United States of America, Plaintiff v. William B. Tanner, Defendant, (Exhibit "A") was filed in the United States District Court for the Western District of Tennessee, Western Division, wherein Petitioner was charged with a violation of 18

United States Code, Section 1341 and Section 2, mail fraud, a felony. On the May 3, 1985, Petitioner pled guilty to said charge pursuant to a plea agreement which was filed in this Honorable Court on January 30, 1985.

3. On May 3, 1985, a Judgment and Probation Commitment Order (Exhibit "B") was entered with this Honorable Court and on May 3, 1985, Petitioner was sentenced to a period of four years incarceration and a fine of $16,000.00 pursuant to said plea agreement. A $1,000.00 fine was imposed for violation of 18 U.S.C. §1341.

4. Petitioner was committed to custody of the Attorney General and served the sentence ordered by this Honorable Court.

5. Count I of the Information, Title 18, United States Code, Section 1341 and Section 2, which is attached hereto and incorporated herein by reference as Exhibit A provided in paragraph 2:

> Beginning sometime prior to February 1, 1981, the exact date unknown, and continuing thereafter to on or about August 30, 1982, in the Western District of Tennessee, and elsewhere, William B. Tanner, aided, abetted, counseled and induced by Ted Filipowicz, knowingly, willfully and unlawfully devised and intended to devise a scheme and artifice to defraud Majik Markets of the honest and faithful services of Ted Filipowicz.

6. Count I of the Information charged what is commonly known as the "Intangible Rights Mail Fraud Theory" which fails to state a crime pursuant to McNally v. United States, ___ U.S. ___, 107 S.Ct. 2875 (1987) and thus said conviction should be overturned and dismissed by this honorable court.

7. McNally, id. held that Title 18 United States Code Section 1341 does not protect intangible rights as alleged in Count I of Petitioner's information but rather only applies to property rights in the nature of money or property;

8. The conviction under Title 18, United States Code Section 1341 and Section 2

constitutes a fundamental error, and justice requires that this Court enter an Order dismissing this conviction pursuant to Title 28, United States Code Section 1651 and order, return of the $1,000.00 fine improperly imposed.

9. That the mail fraud conviction heretofore discussed is void as a matter of law since the allegations in the information fail to state a crime resulting in violation of Petitioner's constitutional rights.

10. Petitioner relies further on the Memorandum and Affidavits submitted herewith and incorporated herein by reference.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully moves this Court:

1. To enter an order dismissing Petitioner's conviction under the Intangible Mail Fraud Theory, Title 18, United States Code, Section 1341 and Section 2;

2. That Petitioner's record be expunged as to said conviction; and that the Court

order return of the $1,000.00 fine imposed pursuant to said improper conviction;

3. For such further relief to which Petitioner may be entitled.

Respectfully submitted,

By: /s/ Frank J. Glankler
Frank J. Glankler
Disc. No. 8440

By: /s/ J. N. Raines
J.N. Raines
Disc. No. 8121

OF COUNSEL:

GLANKLER, BROWN, GILLILAND,
CHASE, ROBINSON & RAINES
1700 One Commerce Square
Memphis, Tennessee 38103
(901) 525-1322

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been served upon Mr. W. H. Ewing, Jr., United States Attorney, Federal Building, 167 North Main, Memphis, Tennessee 38103 this 5 day of May, 1989.

/s/ William L. Hendricks

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,

Plaintiff,

v. No. 85-20030-M
Oral Argument Requested

WILLIAM B. TANNER,

Defendant.

AFFIDAVIT OF WILLIAM B. TANNER
IN SUPPORT OF PETITION FOR WRIT OF ERROR
CORAM NOBIS

STATE OF TENNESSEE

COUNTY OF SHELBY

William B. Tanner, being first duly sworn would state unto the court as follows:

1. That on January 30, 1985, a four count information was filed against William B. Tanner Count I of said information charging violation of Title 18, United States Code §1341 and Section 2;

2. That pursuant to a plea agreement filed January 30, 1985, Petitioner pled guilty

to said four count information and was subsequently sentenced on May 3, 1985 as set out in the judgment and probation commitment order which is a part of the record in this cause;

3. That Petitioner duly reported to the custody of the Attorney General as required and served his sentence thereunder;

4. That Petitioner's guilty plea to Count I of the information is grounded upon the intangible rights mail fraud theory;

5. That the results of this conviction persist and that Petitioner has acted with due diligence with regard to all matters pertinent herein;

6. That Petitioner is justly entitled to the relief sought herein;

WHEREFORE, the affiant prays that a Writ of Error Coram Nobis is granted by this Court, setting aside the conviction of affiant to Title 18, United States Code §1341 and Section 2; that affiant's record of this conviction be

expunged; that the $1,000.00 fine imposed pursuant to this improper conviction be returned and that Petitioner be granted further relief as may be just and proper.

/s/ William B. Tanner
WILLIAM B. TANNER

Subscribed to and sworn to before me this 5 day of May, 1989.

/s/
Notary Public

My Commission Expires:

November 10, 1992

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon Mr. W. H. Ewing, United States Attorney, Federal Bldg., 167 North Main, Memphis, Tennessee, 38103, this 5 day May, 1989.

William L. Hendricks

(2)

No. 93-1342

Supreme Court, U.S.
FILED
APR 20 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM B. TANNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was entitled to a writ of coram nobis to vacate his mail fraud conviction in light of *McNally* v. *United States*, 483 U.S. 350 (1987).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1342

WILLIAM B. TANNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is not reported, but the judgment is noted at 9 F.3d 109. The district court's opinion (Pet. App. A1-A28) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1993. A petition for rehearing was denied on November 23, 1993. Pet. App. C1. The petition for a writ of certiorari was filed on February 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of mail fraud, in violation of 18 U.S.C. 1341, and to three counts of filing a false income tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to four years' imprisonment and ordered to pay a $16,000 fine. Petitioner did not file a direct appeal from his sentence. After completing his sentence, petitioner filed a petition for a writ of error coram nobis to set aside his mail fraud conviction. The district court denied the petition. Pet. App. A1-A28. The court of appeals affirmed. *Id.* at B1-B2.

1. Petitioner was the president and owner of the William B. Tanner Company, a commercial advertising business. In 1981, petitioner agreed to pay a kickback to Ted Filipowicz, the marketing director of Majik Markets, so that Majik Markets would continue to award its advertising business to petitioner's company. An investigation into petitioner's business also uncovered evidence that petitioner had filed false income tax returns with the IRS. Pet. App. A3-A7.

Petitioner pleaded guilty to a four-count information charging him with one count of mail fraud and three counts of filing a false income tax return. The mail fraud count alleged that petitioner devised a scheme to defraud Majik Markets of the "honest and faithful services" of Filipowicz. Pet. App. D2. It further alleged that the scheme was designed so that Filipowicz would use his position at Majik Markets to assure that Tanner Company "would receive certain advertising business from Majik Markets." *Ibid.* In return, Filipowicz would receive "cash" from Tanner Company. *Id.* at D2-D3. Both Tanner Company and Filipowicz "were to profit financially." *Id.* at D3.

2. While petitioner was serving his sentence, this Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute requires proof of a deprivation of money or property and does not extend to a deprivation of the intangible right to honest services. After completing his sentence, petitioner filed a petition for a writ of error coram nobis to set aside his mail fraud conviction in light of *McNally*.*

The district court held that the mail fraud count did not allege a violation under *McNally*. The court reasoned that the information did not allege that Majik Markets had been deprived of money or property since there was no allegation that Majik Markets incurred any additional costs as a result of the payments to Filipowicz. Pet. App. A16-A17. The court nonetheless held that petitioner was not entitled to coram nobis relief. Had it known that the mail fraud count was invalid, the court explained, it would have sentenced petitioner to the same four-year prison term. *Id.* at A25-A26. The court also denied relief because petitioner's "sentence ha[d] been executed, and there [were] no continuing civil disabilities not also caused by the three felony income tax convictions." *Id.* at A27.

The court of appeals affirmed. Without elaborating on the ground for its decision, the court stated that "no prejudicial error intervened in the judgment and proceedings in the district court." Pet. App. B1-B2.

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* Congress subsequently amended the federal fraud statutes to provide that a "scheme or artifice to defraud includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508, codified at 18 U.S.C. 1346. That amendment, of course, does not apply to petitioner's conduct.

ARGUMENT

1. Petitioner contends (Pet. 11-44) that his mail fraud conviction rested on the intangible rights theory rejected in *McNally* and that he is therefore entitled to a writ of coram nobis to set aside that conviction. Petitioner's contention is without merit.

In *United States* v. *Morgan*, 346 U.S. 502, 512 (1954), this Court held that only errors "of the most fundamental character" warrant coram nobis relief. The Court also emphasized that the remedy should be granted "only under circumstances compelling such action to achieve justice." *Id.* at 511.

Petitioner failed to satisfy that demanding standard. While the information to which petitioner pleaded guilty alleged that petitioner had deprived Majik Markets of the "honest and faithful services" of Filipowicz, it also alleged that petitioner gave kickbacks to Filipowicz to assure that petitioner's company "would receive certain advertising business from Majik Markets." Pet. App. D2. Petitioner therefore pleaded guilty to a classic mail fraud violation under which petitioner obtained money from Majik Markets through fraud. In those circumstances, petitioner was not entitled to coram nobis relief. *United States* v. *Osser*, 864 F.2d 1056, 1063 (3d Cir. 1988) (coram nobis unwarranted when conviction rests on both intangible rights violation and deprivation of money or property violation) (collecting cases).

Petitioner asserts (Pet. 16) that the information did not charge that Majik Markets lost money or property since there was no allegation that Majik Markets "could have received better advertising at a better price or that Majik Markets paid a larger commission than agreed or customary." Such an allegation, however, was unnecessary. As Judge Hand explained in his opinion in *United*

States v. *Rowe*, 56 F.2d 747, 749 (2d Cir.), cert. denied, 286 U.S. 554 (1932):

> A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the [mail fraud] statute is directed.

Post-*McNally* decisions have reached the same conclusion. *United States* v. *Wallach*, 935 F.2d 445, 463-464 (2d Cir. 1991); *United States* v. *Kerkman*, 866 F.2d 877, 880 (6th Cir.), cert. denied, 493 U.S. 828 (1989); *United States* v. *Fagan*, 821 F.2d 1002, 1009 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988).

Kerkman is particularly instructive. There, the defendant took a kickback (from a supplier) while performing a fixed-price government contract. The defendant argued that he could not be guilty of mail fraud since the kickback did not cost the government any money. The court rejected that argument. By hiding the kickback, the court explained, the defendant had led the government to part with its money on the basis of a false premise. 866 F.2d at 880. Such conduct, the court held, fell squarely within the ambit of the mail fraud statute as described in *McNally*. *Ibid.* That reasoning is equally applicable here.

In any event, "[c]ollateral review of a final judgment * * * is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid." *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982). Petitioner made no such showing. As the district court found (Pet. App. A27), petitioner has already

completed his sentence, and he suffers no continuing civil disabilities not also caused by his three unchallenged income tax convictions. Although petitioner asserts (Pet. 35) that his mail fraud conviction has continuing consequences, he does not challenge the court's finding that his income tax convictions have exactly the same consequences. For that reason as well, coram nobis relief was properly denied.

2. In the aftermath of *McNally*, there was considerable disagreement in the courts of appeals concerning the availability of coram nobis to set aside mail fraud convictions that were based on an intangible rights theory. In particular, the courts of appeals were divided on whether coram nobis relief was available when the indictment properly stated an offense, but the court's instructions permitted the jury to convict on an intangible rights theory. Compare *United States* v. *Keane*, 852 F.2d 199 (7th Cir. 1988) (coram nobis unwarranted), cert. denied, 490 U.S. 1084 (1989); *United States* v. *Stoneman*, 870 F.2d 102 (3d Cir. 1989) (same), cert. denied, 493 U.S. 891 (1989) with *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988) (coram nobis available), cert. denied, 491 U.S. 906 (1989); *Allen* v. *United States*, 867 F.2d 969 (6th Cir. 1989) (same). There was also a conflict on how to determine whether a conviction had the kind of continuing consequences that would justify coram nobis relief. Compare *Hirabayashi* v. *United States*, 828 F.2d 591 (9th Cir. 1987) (government must rebut presumption of continuing consequences) with *Keane*, *supra* (petitioner must demonstrate continuing legal consequences).

In light of those conflicts, the government filed a petition for a writ of certiorari in *Mandel*, and acquiesced in the petition for a writ of certiorari in *Keane*. This Court, however, denied both petitions. In the ensuing five years, the number of cases raising coram nobis is-

sues in light of *McNally* has steadily declined, and few, if any, such claims are likely to arise in the future. See note *, *supra*. Accordingly, there is even less reason now to grant certiorari in cases presenting such issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

THOMAS E. BOOTH
Attorney

APRIL 1994